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In the Supreme Court of the United States

OCTOBER TERM 1962

No. 330

CITIZENS UTILITIES COMPANY OF CALIFORNIA, a corporation,

Appellant,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE COUNTY OF SACRAMENTO, AND CITY OF NORTH SACRAMENTO, a municipal corporation (Real Party in Interest),

Appellees.

Appeal From the Judgment of the District Court of Appeal, State of California, in and for the Third Appellate District.

Appellant's Reply to Motion to Dismiss or Affirm

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Appellant's Reply to Motion to Dismiss or Affirm

Appellee CITY OF NORTH SACRAMENTO has moved to dismiss or affirm herein on twofold grounds: 1) the alleged absence of a substantial constitutional question and 2) that the constitutional question was not timely raised. Appellant's contentions in opposition to the motion can be summarized as follows:

1. Appellant contends that determination of the constitutionality of the public taking of private property upon payment of *partial* "just compensation" and without provision insuring prompt payment of the balance thereof involves a substantial question arising under the "due process" clause of the 14th Amendment.

2. Appellant contends that under the particular facts of this case, its motion to stay execution on the Interlocutory Judgment of Condemnation was the proper and timely mode of raising such constitutional question.

I.

THE CONSTITUTIONAL ISSUE IS SUBSTANTIAL

Appellee is *partially* correct in its recitation of the rule of federal "due process" relating to the time of payment of "just compensation". The Federal Constitution indeed does not require advance payment of "just compensation", or establish any standard of what *factually* insures "due process" and what does not. (See Motion to Dismiss, etc. p. 4). It does, however, as repeatedly declared by this Court, require that there be adequate provision for a reasonably just and prompt ascertainment and *payment* of compensation following a taking. (See cases cited, "Statement as to Jurisdiction" p. 14)

Significantly, Appellee has not cited a single decision which disagrees with this principle. Rather, it seeks to dissuade this Court from considering whether the rule has been violated in *this* case because the court has determined it not to have been breached in cases involving other facts and different statutes. In other words, the rule does not apply here because it did not apply elsewhere.

The taking of private property without "just compensation" constitutes a deprivation of "due process" under the 14th Amendment to the federal constitution:

Appleby v. Buffalo, (1911) 221 U.S. 524; 530;
Dohany v. Rogers, (1930) 281 U.S. 362.

The question of whether a property owner has been deprived of his property without "just compensation" is not always easily reconcilable:

> "The constitution declares that private property shall not be taken for public use without just compensation. It does not require that compensation shall be actually paid in advance of the occupancy of the land to be taken. But the owner is entitled to reasonable, certain and adequate provision for obtaining compensation before his occupancy is disturbed. *Whether a particular provision be sufficient to secure the compensation to which, under the constitution, he is entitled, is sometimes a question of difficulty.* (Emphasis added).
>
> *Cherokee Nation v. Southern Kansas R. Co.*, (1889) 135 U.S. 641, 659;
>
> *Sweet v. Rechel*, (1895) 159 U.S. 380, 402.

In this case the statutory procedure followed by Appellee (California Public Utilities Code, §§ 1401-1421) (Appendix B, "Statement as to Jurisdiction"), provides that after the judgment of condemnation is entered in the court action, the owner may file a petition with the California Public Utilities Commission asking that Commission to assess the increase in "just compensation" due for the property, which has occurred as the result of "expenditures made by the owner subsequent to the date of filing of the original petition with the Commission, for the purpose of preserving or improving the lands, property and rights, or by reason of other acts and occurrences subsequent to that date. . . ."

(California Public Utilities Code, § 1417). (A corresponding application by the condemnor for a decrease in the original award may also be filed). Notwithstanding, Section 1419 of the Code declares:

> "... The filing of either or both the petitions specified in Section 1417 shall not act as a stay of the judgment in condemnation, *but upon the payment of the just compensation fixed in the original judgment of condemnation the plaintiff in the action shall be entitled to immediate possession of the lands, property, and rights.*" (Emphasis added.)

Thus Section 1419 under which Appellee has sought to justify its right to take possession herein is completely silent on the question of *when, where and how* Appellant will receive the balance of "just compensation" which shall be decreed due it in the supplementary proceedings before the California Public Utilities Commission. It is apparent that under the acquisition arrangement which the California courts sanctioned in this matter in mid-1962, when the final assessment of "just compensation" is amended into the Interlocutory Judgment of Condemnation, Appellant will find itself having experienced the involuntary conversion of its utility system into a partially-satisfied judgment against a municipal condemnor.

In view of the poor financial condition of Appellee, the provisions of California law regarding immunity of municipal property from execution and the permissible ability of municipalities to stagger payment of judgment debts over a ten-year term (see statutes quoted "Statement as to Jurisdiction", pp. 15-16), Appellant submits that it cannot be fairly conceded that there is any "reasonable, certain and adequate" likelihood that Appellant will realize prompt

payment of the balance of "just compensation" due it as required by the federal "due process" clause.

Appellee contends that the fact that its property is exempt from execution (thus for all practical purposes making enforcement of any judgment by Appellant impossible), is not at all important. It contends this Court is aware that general immunity from execution exists as regards public property but that nevertheless it has upheld state statutes against a similar "due process" attack in other cases Appellant has cited. But the only ground upon which such decisions could offer any support for Appellee's argument would be if this Court had demonstrated in upholding the statutes therein that an unsecured judgment rendered in an eminent domain action against a governmental entity satisfies "due process" *per se*—. In none of the decisions was this the holding. Nowhere has this Court validated as constitutional the relegation of a property owner to a judgment which cannot be readily executed upon and which permittedly need not be paid by the judgment-debtor for a period of 10 years following entry of judgment!

Appellee makes reference to *Sweet v. Rechel*, (1895) 159 U.S. 380, to which Appellant has referred. It contends that although the statute there in question relegated the property owner to a judgment claim against the city, no constitutional defect was found by this Court. Actually the holding in that case did not rest upon the fact that the owner was given a judgment against the condemning authority. It rested on this Court's determination that the judgment in question was an *enforceable* one, i.e., one which could be "effectively enforced by judicial process". (159 U.S. at 406). Significantly, the statute authorizing the taking there provided:

> "When it shall be finally determined what amount of damages any party is entitled to recover against the

> city of Boston . . . or any other party defendant, a separate decree shall be entered accordingly *and execution thereafter shall be issued* without regard to the pendency of claims of any other party or parties or of other claims of such complainant." (159 U.S. at 384).

Appellee further refers to the *Crozier* case, (224 U.S. 290), concluding therefrom that constitutional guarantees of "due process" have been met by the pledge of public faith to make payment and implying that such a pledge may be inferred to proceed from a judgment against a municipal condemnor. The *Crozier* case cannot be so tortured.

In *Crozier* a federal act provided that a patent owner might recover reasonable compensation in the Court of Claims for federal infringement on a U.S. granted patent. This Court declared that a statute providing for compensation after taking was proper if "adequate means be provided for a reasonably just and prompt ascertainment and payment of the compensation", and that, "the duty to provide for payment of compensation may be adequately fulfilled by an assumption on the part of government of the duty to make prompt payment of the ascertained compensation, that is, by the pledge, either expressly or by necessary implication of the public good faith to that end." The opinion evidences this Court's interpretation that there was no doubt that payment of a judgment obtained in the Court of Claims against the United States would be promptly made . . . (the same requiring only a federal appropriation). That payment by this means can properly be termed prompt payment cannot be gainsaid. ". . . Congress always has heretofore appropriated the money required to pay the judgments of the Court of Claims. . . . Nothing but a flagrant breach of good faith could delay the payment." *(Great Falls Mfg. Co. v. Garland,* (1885) 25 Federal 521).

Payment of a judgment against the government by Congressional appropriation is a far cry from the situation here where there is no semblance of any pledge of prompt payment by Appellee City. Furthermore, as we shall discuss hereafter, pledge of the credit of the United States and a pledge of the credit of Appellee City cannot reasonably be placed on any comparable ground.

Appellee lastly refers to *Williams v. Parker*, (188 U.S. 491), which it mistakenly declares we have cited to this Court; it contends that this Court there declared "that the 'adequate provision for compensation' test was satisfied by a provision that the person whose property was taken could recover 'in the manner prescribed by law'". The argument is that this Court declared that realization upon a judgment debt in the fashion prescribed by local law satisfies "due process." Not so! Sections 3 and 4 of the act involved in *Williams* provided that persons claiming injury might recover damages "in the manner prescribed by law for obtaining payment for damages sustained by any person whose land is taken in the laying out of a highway in said city." This Court did not relate what manner was prescribed by state law for compensating a land owner under such circumstances. It declared, however, that the statute referred to made "suitable provision for such recovery" (188 U.S. at 503). The case did not involve the question of whether a taking of property could precede compensation; but whether "due process" was satisfied by a statute which authorized taking of property by the State of Massachusetts but required the property owner suffering injury to look to the City of Boston, which had no part in the taking, for recompense. The Court concluded that the Legislature had provided a debtor whose solvency was of "substantial permanence" and that moreover "a direct and appropriate

means of ascertaining *and enforcing* the amount of all such damage" had been provided by the act. This case is far removed from the provisions of Section 1419 which are completely silent on the question of how Appellant will enforce its judgment for the balance of "Just Compensation."

Appellee contends our statement that the City must look to the proceeds from its bond sale as the only source from which to pay the amount of "just compensation" is not correct and is without support in the record. (Motion to Dismiss or Affirm, p. 6.) It further maintains that the provisions of the California Government Code to which Appellant has referred, authorizing municipal payment of judgments in percentage installments over a decade, is evidence of its ability to pay the judgment. Appellant has no quarrel with the proposition that the City is empowered to pay the balance of any unsatisfied judgment against it by exercising its general tax powers—but this does not dispell the fact that its Council may decide to levy its tax authority on a percentage basis. This Court can well imagine the significant tax impact on the residents of this 5th-class city which would flow if the balance of the judgment were to be paid by the City all at once. The desire of the City Council to spread out such extra tax burden as long as possible can be easily imagined. It is submitted that Appellant's interest as a property owner demands that it promptly receive payment of entire "just compensation"—not merely a percentage thereof each year. The federal principle of "due process" here involved requires that provision be made for payment of all compensation due "without unreasonable delay" (*Bragg v. Weaver*, (1919) 251 U.S. 57).

Apart from its reference to its general taxing authority, Appellee in no way supports its criticism of Appellant's charge that Appellee is limited to the proceeds from its

bond sale as the only source from which to make prompt payment. Appellee has not demonstrated that it has *any* assets of *any amount* and character currently available for payment of the balance of "just compensation". The record shows by the sworn affidavit of Appellee's City Manager that it was required to incur a bonded debt of $2,500,000 before it could even pay the amount of "just compensation" fixed in the original Public Utilities Commission valuation proceeding.*

In this very motion Appellee has conceded that it is looking to the balance of the bond sale proceeds to pay the supplementary assessment of "just compensation". It would have this Court believe that these proceeds afford Appellant adequate protection because they provide sufficient to pay Appellee's "own estimate" of the maximum supplemental award. (Motion to Dismiss or Affirm, p. 6.) This so-called "estimate" is the absolute epitome of convenient self-serving contention!

Though Appellant filed a *verified* declaration in the trial court in support of its motion to stay execution which demonstrated 1) that during the period December 3, 1956 to January 1, 1962, Appellant had made net additions and betterments to its utility system of the fair value of not less than $539,471.00, and that 2) the system evaluated by the Public Utilities Commission as of December 3, 1956 had appreciated in value by not less than $83,633 during that

*Manager Jack declared:

"... in order to finance the acquisition of said municipal water system the bonds hereinbefore referred to as authorized must be issued and sold; *and that Plaintiff has no sufficient moneys otherwise to pay the sum assessed in said Interlocutory Judgment for the said municipal water system;* that it is therefore necessary that Plaintiff issue and sell its authorized but unissued bonds in order to pay the sum so assessed." (Emphasis added.)

term, *Appellee offered no verified opposition to Appellant's showing.*

We are not surprised that no one would dare to verify the accuracy of Appellee's opposing "estimate." This "estimate" was reached after Appellee had received a letter from the California Public Utilities Commission Staff that as of June 30, 1961 the total net increase in Appellant's utility plant (computed at cost to Appellant) approximated *$448,000!* How Appellee could in good faith arrive at an estimate of $185,000 net additions and betterments for the period ending January 1, 1962 (6 months greater), defies honest comprehension. Assuming that not a single penny of plant were added by Appellant after June 30, 1961, Appellee would depreciate the net additions made to that date by an aggregate of 59%. (One can appreciate how artificial such a depreciation rate is when it is realized that the major items of this utility system constitute water transmission and distribution mains, facilities having *long* lifespans.)

Appellant contends that the question of the constitutional propriety of a statute which authorizes public authority to take over possession of private property upon payment of

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*Appellee's statement in n. 11 at p. 6 of its Motion that "Applicant's [sic] contention for a larger figure is based on a theory rejected by the California Public Utilities Commission in *Application of City of Redding*, 20 C R C 1022", is a clear example of the shocking extremes to which it would go to mislead this Court as to the true status of this case. The California Public Utilities Commission *Redding* decision confined itself to the question of whether in a supplementary valuation proceeding, a utility could claim appreciation on the plant originally valued by the Commission. Less than 15% of Appellant's claim for an increase in the award of "just compensation" of approximately $625,000 relates to a claim for appreciation such as was referred to in the Commission decision. This leaves additions and betterments amounting to approximately $540,000 which have been added to Appellant's system through the period ending January 1, 1962 - - - over three months before Appellant's Motion to Stay Execution was argued in the lower Court.

partial "just compensation" and which fails to provide a means of affording reasonable assurance that the balance due will be promptly paid, presents a very serious and substantial issue as to a violation of "due process" under the 14th Amendment. We do not herein contend that a deposit of security is the *sine qua non* of "due process" under all circumstances. We do emphatically contend, however, that a statute which relegates a property owner to the position of a judgment creditor under *these* circumstances must of necessity provide for an advance deposit by the condemnor in order to insure ready enforcement of the judgment.

II.

THE CONSTITUTIONAL ISSUE WAS TIMELY RAISED

Appellee maintains that the constitutional issue cannot now be raised by Appellant because the Interlocutory Judgment of Condemnation has become final following appeal and the constitutional question was not raised at trial or on appeal. Appellee relies on *Chicago, Indianapolis and Louisville Ry. Co. v. Hackett*, (1913) 228 U.S. 559, which actually holds that this Court will not determine a question of federal constitutionality raised for the first time in this Court.

The rule that on appeal from a state court judgment this Court will not review the objection that a state statute is unconstitutional unless timely raised below has been frequently applied. The Court has explained its policy thusly:

> "In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose juridical action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not

properly presented, due regard for the appropriate relationship of this Court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these reasons that this Court, where the constitutionality of a statute has been upheld in a state court, consistently refuses to consider any grounds of attack not raised or decided in that court."

McGoldrick v. Compagnie Gen. Transatlantique, (1940) 309 U.S. 433, 434.

It cannot be denied, however, that this Court recognizes that the "due process of law" protection which the 14th Amendment exacts from the states is a "conception of fundamental justice." (*Foster v. Illinois*, (1947) 332 U.S. 134), and that where injustice might otherwise result, this Court *will* consider questions of law which were not only not raised in timely fashion *but which were not passed upon by the lower court at all:*

"Rules of practice and procedure are devised to promote the ends of justice not defeat them. A rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with this policy. *Ordinarily rules of practice do not require sacrifice of the rules of fundamental justice.* . . . These decisions and others like them, while recognizing the desirability and existence of a general practice under which appellate courts confine themselves to the issues raised below, nevertheless do not lose sight of the fact that such appellate practice should not be applied where the obvious result would be a plain miscarriage of justice." (Emphasis added.) (*Hormel v. Helvering*, (1941) 312 U.S. 551, 557-8.)

The above authority is not herein cited to infer that this Appellant failed to raise the federal question in the state

courts or that the same was not timely raised. The authority is cited to demonstrate that even assuming *arguendo* that Appellant had not raised its objection in timely fashion, this Court will not apply the aforesaid rule in utter disregard of the equities of the situation.

The following facts, all of which are amply supported by the record below, demonstrate that the constitutional issue here involved was raised and *was timely* raised in the lower courts:

When this Court examines the "Complaint in Eminent Domain" filed by Appellee in the California Superior Court on November 6, 1958, it will readily discern that nowhere in the *body* of that Complaint was there any reference whatsoever to the circumstances whereunder Appellee as Plaintiff-condemnor might make partial payment and acquire *possession of* Appellant's utility system prior to the payment of full "just compensation" and to completion of the proceeding. The only reference to possession appeared in the *prayer* of the Complaint. It is fundamental law in California that the *prayer* does not constitute any portion of the *cause of action*. (*Merlino v. West Coast Macaroni Mfg. Co.*, (1949) 90 C.A. 2d 106, 112; *39 Calif. Jurisprudence 2d*, "Pleading", § 30), and that a prayer asking for relief to which the pleader is not legally entitled may be disregarded. (*Meyer v. San Francisco* (1907) 150 Cal. 131, 133-5.)

> "The subject matter of an action and the issues involved are determinable *from the facts pleaded*, rather than from the title or prayer for relief. . . . If a plaintiff prays for relief beyond the obvious purpose of the complaint and not warranted by the facts alleged the prayer may be disregarded." (Emphasis added.)
>
> *Weber v. Superior Court*, (1945) 26 Cal. 2d 144, 148.

> "Issues arise upon the pleadings when a fact or a conclusion of law *is maintained* by the one party and is controverted by the other." (Emphasis added.)
>
> *California Code of Civil Procedure*, § 588.

It is apparent then, that the Complaint below did not relate itself to the issues of payment or possession.

Rules regarding the conduct of pre-trial conferences in civil proceedings were introduced into California in 1957.* Their objective is to simplify the trial of lawsuits by placing cases in focus so that the defined and precise issues may be resolved as quickly as possible.

Fitzsimmons v. Jones, (1960) 179 C.A. 2d 5, 8;
Spence v. State of California, (1961) 198 A.C.A.† 337, 343.

To that end the pre-trial rules require that the attorneys for the parties confer in advance of the pre-trial conference "to reach agreement upon as many matters as possible." (Rule 8.2(b)). The attorneys are expressly required to submit joint written statements of the matters agreed upon to the court, and they may join in a written statement of the "factual and *legal contentions* to be made as to the issues remaining in dispute." (Rule 8.2(c)). At the pre-trial conference, the pre-trial judge may consider and act upon the written statements submitted under Rule 8.2 and the statements of the factual and legal contentions made as to the issues remaining. (Rule 8.4.) Following the pre-trial conference, the pre-trial judge is required to execute an order setting forth a delineation of the factual and legal contentions made by each party as to the issues remaining in dispute. (Rule 8.6(a)(1)). The parties are allowed 5 days following service of a copy of the pre-trial order to make requests for corrections and modifications therein and failing such request the pre-trial order is filed in the case.

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*"Rules for the Superior Courts", Rule 8.1-8.12.

†Advance California Appellate Reports.

"When filed, the pre-trial order becomes a part of the record in the case and, *where inconsistent with the pleadings, controls the subsequent course* of the case unless modified at or before trial to prevent manifest injustice." (Emphasis added) (Rule 8.5).

Request for relief from limitations of a pre-trial order must be made by motion. (Rule 8.8).

In the Court condemnation proceeding in this matter below, the parties submitted a joint pre-trial statement. The pre-trial order evidences that only special legal counsel for Appellee appeared at the pre-trial conference to introduce such statement on behalf of both parties. The pre-trial statement *set forth the contentions and issues which the parties mutually agreed existed between themselves.* A cursory inspection thereof reveals that no issue was therein made regarding the conditions whereunder Appellee might be able to take over physical *possession* of Appellant's system (assuming Appellee had legal authority to condemn the same). Nowhere in the nine (9) definite issues jointly enumerated in the pre-trial statement *as incorporated into the lower court's pre-trial order*, is there the remotest reference to the question of possession pending completion of the proceeding. Nowhere in the seven (7) specific contentions *which Appellee framed setting forth its position in the suit* was any mention of the contention that Appellee should be entitled to take over possession of Appellant's water system upon payment of only the sum of $2,206,000 and without regard to the balance of "just compensation" to be assessed in the supplementary valuation proceeding before the State Public Utilities Commission.

The California cases are unanimous in supporting the rule that the delineation of the issues in a pre-trial order controls the course of the proceeding so as to effect the

exclusion of contentions not raised at pre-trial. The California courts have stated:

> "The parties and the court are entitled to rely on their pre-trial order in going to trial."
>
> *Gordon v. Reynolds*, (1960) 187 A.C.A. 507; 10 Cal. Rptr. 73, 75;
>
> *Baird v. Hodson*, (1958) 161 C.A. 2d 687;
>
> *Campbell v. Magana*, (1960) 186 A.C.A. 793; 8 Cal. Rptr. 32, 35.
>
> (Joint pre-trial statement incorporated into the pre-trial order by reference held to eliminate an issue not therein enumerated).

These authorities attest to the fact that under Rule 8.8, that portion of the Interlocutory Judgment of Condemnation which purported to authorize the acquisition of possession by Appellee pending completion of the proceedings was outside of and beyond the issues in the case.

Importantly, even the judge that tried this case interpreted the issues, in light of the pleadings and the pre-trial conference order, as not embracing the issue of Appellee's right to take possession pending completion of the proceeding. In his Memorandum Opinion after trial dated October 5, 1959 he clearly indicated that he understood that the issues presented at trial dealt only with a) Appellee's power to condemn property outside its municipal boundaries and b) whether it was necessary for Appellee to condemn portions of Appellant's water system outside municipal boundaries.

This court will appreciate from examination of Section 1416 of the Public Utilities Code (see Appendix B, p. 5, "Statement as to Jurisdiction"), that while the Interlocutory Judgment in a condemnation action such as this must contain the provision that it is subject to modification by

reason of such increase or decrease in just compensation as may thereafter be certified to the court by the California Public Utilities Commission, there is no requirement that the judgment as entered refer to payment, possession or final judgment. These latter questions relate to procedural considerations and as such to matters which might very well have been changed before the time for their application in this case arose. As the provisions of the California Public Utilities Code relating to eminent domain are procedural rather than substantive, they are subject to change even as regards pending actions.

City of Los Angeles v. Oliver, (1929) 102 C.A. 299, 315, 319.

It is therefore manifest that the portion of the Interlocutory Judgment relating to payment and possession was not intended by the trial Court as a "final" adjudication on these subjects.

In California, in order to be appealable a judgment must be "final". (*California Code of Civil Procedure*, § 963); An appeal by Appellant following entry, from those portions of the Interlocutory Judgment relating to possession, would therefore have been subject to dismissal on grounds of prematurity.

It is furthermore apparent that at trial it was *wholly unnecessary* for the trial Court to have incorporated into its judgment any reference to payment, possession or final judgment for the purpose of resolving the issues framed by the parties. Under California law these are all matters that are expressly covered by statute and which follow as a matter of law *to the extent that the law is valid*. The Court's reference to the taking of possession and payment thus constituted not an adjudication *defining and creating*

rights but only a *recitation* of what the future procedure would be as provided by existing statutes. In this regard, the language of the judgment was similar to a recitation in an interlocutory decree of divorce in California that upon expiration of one year the prevailing party shall be entitled to a final decree. The final decree could be obtained in the manner provided by law in the absence of any provision therefor in the interlocutory. Thus to the extent the judgment here purported to authorize possession in accordance with the provisions of Section 1419 of the Public Utilities Code it added nothing. An appeal from such judgment would accomplish nothing—. If this language had been deleted from the judgment on appeal, Appellee was still in position to seek to acquire possession on the very same terms by direct reliance on Section 1419.

The question then arises as to when and by what means Appellant should have raised the constitutional objection here asserted.

It is clear that when the Interlocutory Judgment of Condemnation was entered in November 1959 Appellee could not pay the same. This is evidenced by the fact that although the judgment was affirmed on appeal in July 1961—over 20 months later, Appellee was even then forced to file a request under California Code of Civil Procedure § 1251 for a one-year extension within which to sell bonds to pay the amount referred to in the judgment in order to avoid a decree that it had abandoned the condemnation.

Having requested and received the one-year extension, Appellee still was not under legal obligation to proceed with the matter; it could still have abandoned the condemnation at its election. But if it undertook to sell its bonds, the proceeds would have to be devoted to purposes consistent with the authority previously obtained from its electorate

and consistent with the representations made by it to its bond buyer. A formal Resolution by Appellee's Council calling for bids on bonds and authorizing representations to be made in connection with their sale and regarding disposition of bond proceeds would however constitute formal overt evidence of election to proceed.

Although as we have stated the Interlocutory Judgment of Condemnation was affirmed in July 1961, apart from securing the one-year extension under Section 1251, Appellee did nothing—took no steps whatsoever to sell its bonds—*until March 19, 1962*. (By this time the deadline date to avoid abandonment was a bare four months away.) On that date it adopted its Resolutions Nos. 2650 and 2651 providing for the issuance of two and a half million dollars ($2,500,000) in water revenue bonds, authorizing and directing their sale and establishing an early April date for receiving bids. At this time Appellant was well aware of the statement, made for the first time by Appellee's special legal counsel *after the Interlocutory Judgment was affirmed on appeal*, that Appellee would attempt to take over Appellant's water system by paying only the sum of $2,206,000 wholly without regard to the increase in compensation to be decreed in the supplementary valuation proceedings before the Public Utilities Commission. Accordingly, eleven days following receipt of advice of the action taken by Appellee in adopting such Resolutions, and bearing the aforesaid statement by Appellee's counsel in mind, Appellant filed its Motion in the trial Court to stay execution of the Judgment of Condemnation until full payment of just compensation was made or reasonable security therefor was provided by Appellee. Appellant therein contended that its rights under the State Constitution and under Section 1 of the 14th Amendment to the Federal Constitution were in peril unless a security deposit was made by Appellee

It is submitted that condemnation proceedings are not card games where the parties are left to speculate as to the position of their adversaries. This Court and the Federal Congress have clearly evidenced that each opposes "litigation by ambush." To that end both branches have repeatedly exercised their authority to insure that litigants receive full and complete disclosure of the contentions of their adversaries, so that valuable rights may not be prejudiced by chicane or lost through adherence to technicality.

It is submitted that in view of the proceedings to date in this matter, Appellant has unquestionably raised the federal question in the most appropriate and timely fashion. It is submitted that it would be a grave dereliction of the duty of this Court were it to decline to consider the substantial constitutional question here involved. It is submitted that if the Court were to decline to exercise jurisdiction herein it would only encourage other public authorities to resort to additional artful devices to place property owners in positions where they could not readily assert the deprivation of their constitutional rights before this Court.

For all of the above reasons, it is respectfully requested that this Honorable Court deny Appellee's Motion to Dismiss or Affirm, and that it enter its order noting "probable jurisdiction."

Respectfully submitted.

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of Counsel

BACIGALUPI, ELKUS & SALINGER